Law Tanggie v Untong ak Gantang & Anor

HIGH COURT (KUCHING) — SUIT NO K319 OF 1979
RICHARD MALANJUM JC
28 MAY 1993

Land Law *— Native land — Dealings in native land — Sale and purchase of land — Plaintiff purchaser underage and not a native at time of purchase — Appointment of first defendant as nominee until plaintiff became of age and acquired native status — Arrangement made verbally — Conditions subsequently satisfied — Whether arrangement was illegal, null and void — Whether first defendant held land on trust for plaintiff — Whether arrangement enforceable — Gift of land by first defendant to second defendant — Whether second defendant thereby acquired any interest in said land — Land Code (Sarawak Cap 81) ss 8, 9 & 134(1)*

Trusts and Trustees *— Resulting trust — Sale and purchase of native land — First defendant appointed as plaintiff's nominee until plaintiff became of age and acquired a native status — First defendant as nominal purchaser constituted as resulting trustee for plaintiff who provided the purchase price — Necessity for such arrangement to be in writing — Legality and enforceability of such arrangement — Whether allegation of trust supported by plaintiff's pleadings*

Evidence *— Conflicting testimony — Discrepancies in evidence of both parties — Approach to be taken by court — Credibility of parties — Demeanour to be balanced against other evidence and probabilities of case*

The action of the plaintiff was substantially based on the allegation that the first defendant was the trustee of the plaintiff in respect of native land ('the said land') for which the plaintiff had paid the purchase price and that the second defendant acquired no title to the said land as it was transferred to her by the first defendant as a gift without any regard to the interest of the plaintiff. The plaintiff's evidence was that on or about 27 November 1961, he had bought the said land from one Atok anak Mangnian ('Atok') for the price of RM200. At the material time the plaintiff was underage and had yet to be declared a native, by reason whereof the said land could not be registered in his name. By a verbal arrangement made on 27 November 1961 in the presence of the plaintiff, the first defendant, Atok and one Jelih anak Mawah, since deceased, the plaintiff appointed his guardian, namely, the first defendant, to be his nominee and trustee of the said land until the plaintiff acquired a native certificate. On the same day the plaintiff applied to be declared a native, which application in the form of a statutory declaration (exh P3) was supported by the first defendant and Atok.

In 1963 the plaintiff upon receiving a copy of exh P3 and believing the same to be the native certificate, requested the first defendant to transfer the said land to him but the first defendant excused himself from effecting the transfer then. In 1965 the plaintiff again requested for the transfer of the said land but again the first defendant evaded

doing it. In 1978 the plaintiff repeated his request for transfer of the said land but he was told by the first defendant that the said land had been given to his daughter, the second defendant. The plaintiff's efforts to persuade the second defendant to transfer the said land to him was to no avail. The plaintiff only acquired native status vide a letter dated 20 June 1979 from the District Office at Kuching, and thereafter commenced the present action.

In his defence the first defendant gave evidence that Atok had approached him and sold him the said land for RM100. The first defendant denied the alleged verbal arrangement and stated that the plaintiff had nothing to do with the said land. As for the second defendant, she admitted that the said land had been given to her by the first defendant and stated as well that the said land had been bought by the first defendant from Atok.

The issues for consideration by the court were as follows: (a) which of the conflicting versions of the parties was acceptable based on the evidence adduced; (b) if the finding was for the plaintiff, whether the first defendant held the said land on trust for the plaintiff and if so whether such trust must be in writing; (c) whether there was any question of illegality in the arrangement between the plaintiff and the first defendant; (d) the present position of the said land.

Held, allowing the plaintiff's claim:

(1) On a balance of probabilities, the court found that the version of the plaintiff was the credible and probable version. Specifically the court found that there was a sale of the said land from Atok to the plaintiff with the plaintiff paying the purchase price, that there was an arrangement that the first defendant was to be the nominee of the plaintiff until he attained the age of majority and acquired a native status, that the said land was given to the second defendant by the first defendant for natural love and affection, that the plaintiff had asked the defendants for the transfer of the said land but was refused and that the plaintiff had since acquired a native status and was of full age when he commenced the action.

(2) The first defendant was thus holding the said land on trust for the plaintiff, all the more so as there was credible and acceptable evidence adduced that the plaintiff had paid for the purchase price. This case fitted in with the classical case of a purchase being taken in the name of a stranger, which would constitute the nominal purchaser as a resulting trustee for the one who provided the purchase price. As regards the objection of counsel for the defendants that the pleadings of the plaintiff do not allege any resulting trust, the court held that the contents therein supported the allegation of trust, including the issue of resulting trust and moreover the defendants had not been taken by surprise. The court further held that there was no requirement in the present case for the arrangement made between the plaintiff and the first defendant to be in writing or manifested in writing as it was one of resulting trust.

(3) Where an arrangement or an attempt to deal in native land was made subject to compliance with the provisions of the Land Code (Sarawak Cap 81) ('the Code'), it was not null and void if such an arrangement or attempt to deal is not contrary to the provisions of the Code. It was apparent that the arrangement between the plaintiff and the first defendant was subject to the plaintiff attaining the age of majority and acquiring a native status. There had been no intention to evade the provisions of the Code. Therefore the arrangement made between the plaintiff and the first defendant was not illegal, null or void and, the conditions stipulated under the arrangement having been satisfied, plaintiff was entitled to enforce the arrangement.

(4) The transfer of the said land by the first defendant to the second defendant for natural love and affection, constituted a serious breach of trust besides being fraudulent and dishonest. The first defendant knew of the existing right of the plaintiff yet by a deliberate and dishonest act he caused such right to be obliterated. Accordingly as the second defendant was only a volunteer she did not benefit from such a void transfer by reason of s 134(1) of the Code. Further the court held that since the first defendant held the said land as a bare trustee he was in no position to convey any beneficial interest therein to anyone.

[Bahasa Malaysia summary

Tindakan plaintif sebahagian besarnya adalah berdasarkan dakwaan bahawa defendan pertama adalah pemegang amanah bagi plaintif berkenaan dengan tanah anak watan ('tanah itu') yang harga pembeliannya telah dibayar oleh plaintif dan bahawa defendan kedua telah tidak memperolehi hakmilik tanah itu kerana ianya telah dipindah milik kepadanya oleh defendan pertama sebagai suatu hadiah tanpa mengambil kira hak plaintif. Keterangan plaintif adalah bahawa pada atau kira-kira pada 27 November 1961, beliau telah membeli tanah itu daripada seorang bernama Atok anak Mangnian ('Atok') pada harga RM200. Pada masa yang berkenaan, plaintif adalah di bawah umur dan belum diisytiharkan sebagai seorang anak watan yang menyebabkan tanah itu tidak boleh didaftar dalam namanya. Melalui suatu perjanjian lisan yang dibuat pada 27 November 1961 di hadapan plaintif, defendan pertama, Atok dan seorang bernama Jelih anak Mawah, yang sekarang telah meninggal dunia, plaintif telah melantik penjaganya, yakni defendan pertama, sebagai namaan dan pemegang amanah tanah itu sehingga plaintif memperolehi sijil anak watan. Pada hari yang sama, plaintif memohon untuk pengisytiharan sebagai seorang anak watan. Permohonan itu adalah dalam bentuk deklarasi statutori (eks P3) yang disokong oleh defendan pertama dan Atok.

Dalam tahun 1963, plaintif sebaik sahaja beliau menerima sekeping salinan eks P3 dan dengan kepercayaan bahawa salinan eks P3 itu adalah sijil anak watan, meminta defendan pertama memindah milik tanah itu kepadanya tetapi defendan pertama telah memaafkan dirinya

daripada melaksanakan pindah milik itu pada masa itu. Dalam tahun 1965 plaintif sekali lagi meminta pemindahan milik tanah itu tetapi sekali lagi defendan pertama berjaya mengelak. Dalam tahun 1978 plaintif mengulangi permintaannya bagi pemindahan milik tanah itu tetapi beliau telah diberitahu oleh defendan pertama bahawa tanah itu telah diberikan kepada anak perempuannya, defendan kedua. Usaha plaintif memujuk defendan kedua memindah milik tanah itu kepadanya tidak berjaya. Plaintif hanya memperolehi status anak watan melalui sepucuk surat bertarikh 20 Jun 1979 daripada Pejabat Daerah di Kuching, dan kemudiannya telah memulakan tindakan ini.

Di dalam pembelaannya, defendan pertama memberi keterangan bahawa Atok telah menemuinya dan menjualnya tanah itu bagi RM100. Defendan pertama menafikan perjanjian lisan yang didakwa itu dan menyatakan bahawa plaintif tidak ada apa-apa yang kena-mengena dengan tanah itu. Bagi defendan kedua pula, beliau mengakui bahawa tanah itu telah diberikan kepadanya oleh defendan pertama. Beliau juga menyatakan bahawa tanah itu telah dibeli oleh defendan pertama daripada Atok.

Isu-isu yang timbul untuk pertimbangan mahkamah adalah seperti berikut: (a) yang mana daripada cerita yang bercanggahan yang diberikan oleh pihak-pihak itu harus diterima berdasarkan keterangan yang diberikan; (b) jika mahkamah memihak kepada plaintif, sama ada defendan pertama memegang tanah itu atas amanah bagi plaintif dan jika demikian, sama ada amanah sebegitu semestinya dibuat dalam tulisan; (c) sama ada terdapat apa-apa soalan ketaksahan di dalam perjanjian di antara plaintif dan defendan pertama; dan (d) kedudukan semasa tanah itu.

Diputuskan, membenarkan tuntutan plaintif itu:

(1) Atas imbangan kebarangkalian, mahkamah mendapati bahawa versi yang diberikan oleh plaintif adalah versi yang boleh dipercayai dan mungkin. Secara spesifik mahkamah mendapati bahawa terdapat satu jualan tanah itu dari Atok kepada plaintif dengan plaintif membayar harga pembelian, bahawa terdapat satu perjanjian bahawa defendan pertama akan menjadi namaan bagi plaintif sehingga beliau mencapai umur dewasa dan memperolehi status anak watan, bahawa tanah itu telah diberikan kepada defendan kedua oleh defendan pertama kerana kasih sayang yang semulajadi, bahawa plaintif telah meminta defendan-defendan untuk pemindahan milik tanah itu tetapi telah ditolak dan bahawa plaintif sekarang ini telah memperolehi status anak watan dan adalah berumur dewasa apabila beliau memulakan tindakan ini.

(2) Defendan pertama oleh itu memegang tanah itu atas amanah bagi plaintif, lebih-lebih lagi begitu kerana terdapat keterangan yang mungkin dan boleh diterima bahawa plaintif telah membayar harga pembelian. Kes ini padan dengan kes klasik suatu pembelian yang dibuat dalam nama seorang luar, yang akan menjadikan pembeli nominal seorang pemegang amanah berbangkit untuk

orang yang membekalkan harga pembelian. Berkenaan dengan bantahan peguambela defendan bahawa pliding yang dibuat oleh plaintif tidak mendakwa sebarang amanah berbangkit, mahkamah memutuskan bahawa kandungan di dalamnya menyokong satu dakwaan amanah, termasuk isu amanah berbangkit. Lagipun defendan tidak dicabar secara mengejut. Mahkamah seterusnya memutuskan bahawa tidak ada keperluan di dalam kes ini supaya perjanjian yang dibuat di antara plaintif dan defendan pertama dibuat dalam tulisan atau ditunjukkan dalam tulisan kerana ianya adalah berjenis amanah berbangkit.

(3) Apabila satu perjanjian atau percubaan membuat urusan berkenaan tanah anak watan dibuat tertakluk kepada kepatuhan peruntukan Kanun Tanah (Sarawak Bab 81) ('Kanun itu'), ianya tidaklah terbatal dan tidak berkesan jika perjanjian atau percubaan membuat urusan sedemikian adalah tidak bertentangan dengan peruntukan Kanun itu. Memang jelas bahawa perjanjian di antara plaintif dan defendan pertama adalah tertakluk kepada plaintif mencapai umur dewasa dan memperolehi status anak watan. Tidak ada niat untuk mengelakkan peruntukan Kanun itu. Lantaran itu, perjanjian yang dibuat di antara defendan pertama dan plaintif tidak menyalahi undang-undang, bukan tidak sah dan tidak berkesan dan, memandangkan yang syarat-syarat yang dinyatakan di dalam perjanjian itu telah dipatuhi, plaintif berhak menguatkuasakan perjanjian itu.

(4) Pemindahan milik tanah itu oleh defendan pertama kepada defendan kedua kerana kasih sayang semulajadi mengakibatkan satu pecah amanah yang teruk di samping bersifat menipu dan tidak jujur. Defendan pertama tahu tentang hak plaintif, namun melalui satu tindakan yang sengaja dan tidak jujur beliau telah mengakibatkan hak itu dihapuskan. Oleh itu, memandangkan yang defendan kedua hanyalah seorang sukarelawan beliau tidak boleh mendapat faedah daripada suatu pemindahan milik yang tidak berkesan menurut s 134(1) Kanun itu. Selanjutnya mahkamah memutuskan bahawa oleh kerana defendan pertama memegang tanah itu sebagai seorang pemegang amanah semata-mata (bare trustee), beliau tidak berada dalam apa-apa kedudukan untuk memindah sebarang kepentingan benefisial di dalam tanah itu kepada sesiapa.]

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal 02–293–93.]

Notes

For cases on conflicting testimonies, see 7 *Mallal's Digest* (4th Ed) paras 409–416.

Cases referred to

1 *Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479 (folld)

A
2 *Dyer v Dyer* (1788) 2 Cox Eq Cas 92; 30 ER 42 (refd)
3 *Pettitt v Pettitt* [1970] AC 777; [1969] 2 All ER 385; [1969] 2 WLR 966 (refd)
4 *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182 (refd)
5 *Yew Phaik Hoon v Quah Ooi Keat & Anor* [1969] 1 MLJ 32 (refd)
B
6 *Wong See Leng v C Saraswathy Ammal* [1954] MLJ 141 (refd)
7 *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218; [1955] 3 All ER 864; [1956] 2 WLR 81 (refd)
8 *Lee Phek Choo v Ang Guan Yau & Anor* [1975] 2 MLJ 146 (distd)
9 *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*
C [1976] 1 WLR 852; [1976] 3 All ER 462 (refd)
10 *Tay Guan Ho v Chin Huat Hin Co* [1987] 2 MLJ 704 (refd)
11 *Chong Ngian Shoon v Chai Choon Moi* Suit No KG 57 of 1983 (unreported) (refd)
12 *Agnes Wong Yen Hee v Tang Cheong Tie* [1992] 3 CLJ 1393 (refd)
13 *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281
D (refd)
14 *Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379 (distd)
15 *Idris bin Haji Mohamed Amin v Ng Ah Siew* [1935] MLJ 257 (distd)
E
16 *Hussanjan v Haji Nik Yahya bin Nik Daud & Ors* [1973] 1 MLJ 9 (refd)
17 *Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47 (folld)
18 *Loi Hieng Chiong v Kon Tek Shin* [1983] 1 MLJ 31 (folld)

F
Legislation referred to
Land Code (Sarawak Cap 81) ss 8, 9
Civil Law Act 1956 s 3

Chan Kay Heng (*Chan & Chan*) for the plaintiff.
Kilat Beriak (*David Toh* with him) (*Chew Jugah Wan Ullok Goh & Co*)
G for the defendants.

Cur Adv Vult

Richard Malanjum JC: In this action the plaintiff is claiming for the
H following reliefs (as amended):

(1) a declaration that the first defendant was a trustee of Native Land comprised in Kuching Lease of Crown Land No 5519 (hereinafter called 'the said land') for the plaintiff;
(2) a declaration that the first defendant had wilfully and dishonestly
I committed a breach of trust in transferring the said land by way of a gift to the second defendant;
(3) a declaration that the plaintiff is still beneficially entitled to the whole of the said land in preference to all other volunteers;

(4) a declaration that the transfer by way of gift from the first defendant to the second defendant and registered at the Kuching Land Registry Office on 16 September 1970 is null and void and that it be struck out from the Land Register and issue document of title;
(5) an order that the defendants do deliver the issue document of title to the said land to the plaintiff or his advocate within seven (7) days from the date of order;
(6) an order that the first defendant do execute a memorandum of transfer to transfer back the said land to the plaintiff within seven (7) days from the date of order, failing which the senior assistant registrar to execute the memorandum of transfer;
(7) such further or other reliefs as the court deems just; and
(8) costs.

In essence the action of the plaintiff is substantially based on the allegation that the first defendant was the trustee of the plaintiff in respect of the said land for which the plaintiff paid the purchase price and that the second defendant acquired no title as the said land was transferred to her by the first defendant as a gift without any regard to the interest of the plaintiff. Both the defendants are denying such a claim in their defence.

Having heard the evidence adduced by both sides I am of the view that for the proper adjudication of this case the following issues have to be considered, namely:

(a) which of the conflicting versions of the parties is acceptable by this court based on the evidence adduced. This is basically a finding of fact;
(b) if the finding is for the plaintiff, whether the first defendant held the said land on trust for the plaintiff. If so, whether such trust must be in writing;
(c) whether there is any question of illegality in the arrangement between the plaintiff and the first defendant;
(d) the present position of the said land.

(a) *The conflicting versions of the parties*

In coming to any finding on this issue I remind myself of the generally accepted approach, namely, that my decision will depend on the credibility of the parties. But credibility does not depend solely on demeanour but is to be balanced against the other evidence and the probabilities of the case and the 'possibility of judges being deceived by adoit or plausible knaves or by apparent innocence' (see: *Tan Cheng Hock v Chan Thean Soo & Anor*[1]).

(i) The plaintiff's version

The plaintiff's version is quite simple. He testified that in 1961 he was staying in Kampong Sungai Tapang. He was living alone and supporting himself by tapping rubber trees in the morning before attending school. He was then underage but had the mind to buy land. From the savings he accumulated from the sale proceeds of his rubber which he sold to the first

defendant he bought the said land from one Atok anak Mangnian @ Atok anak Manyit (PW1) on or about 27 November 1961. The plaintiff said that he is a relative of the first defendant and that the first defendant was his guardian since his father passed away before he was born and that his mother was of unsound mind. On that basis the plaintiff said that he took the first defendant as his nominee. The said land could not be registered in the name of the plaintiff at that time as he was then underage and had yet to be declared a native as his father was a Chinese. The plaintiff has since acquired a native status vide a letter dated 20 June 1979 from the District Office, Kuching (exh P5). The plaintiff further testified that his arrangement with the first defendant made on 27 November 1961 was that the first defendant would be his nominee and trustee until he acquired a native certificate. The plaintiff said that the first defendant agreed to the arrangement which was made verbally.

The plaintiff also said that he applied to be declared a native on 27 November 1961 which application was supported by the first defendant and Atok (PW1) who was then the Assistant Tuai Rumah at that time. The application was by way of a statutory declaration a copy of which was duly tendered and admitted as exh P3.

It was also the testimony of the plaintiff that he paid RM200 to Atok (PW1) for the said land. At the time of the transfer there were four persons present, namely, the first defendant, Atok (PW1), Jelih anak Mawah (deceased) and the plaintiff. He said that Jelih was invited to be a witness in case anything happened in the future. The plaintiff said that Jelih could also have been his nominee but since the first defendant agreed and being closer to him he chose the first defendant. He also said that he suggested the arrangement to be put in writing but was told by the first defendant that it would not be necessary as the plaintiff was like his son and that the first defendant promised him that he would not deceive him in the future. The plaintiff also said that he put his trust on the first defendant. He could not transfer the land to his mother as she was of unsound mind and that his brothers were of the same status as him.

In 1963, having received a copy of exh P3, the plaintiff said that he asked the first defendant to transfer the said land to him as he thought exh P3 was the native certificate. However, the first defendant told him that he had a lot of work to do and that the transfer could be done some other time and the plaintiff should not worry.

In 1965 the plaintiff said that he again asked the first defendant to transfer the said land to him but was told by the first defendant not to worry and that the government would transfer the said land to him as long as he paid the transfer fee.

Then in 1978 the plaintiff said that for the third time he asked the first defendant to transfer the said land to him. But the first defendant told him that the said land had been given to his daughter. The plaintiff therefore wrote a letter to the daughter, Adot anak Untong (the second defendant) but received no reply. Consequently, the plaintiff went to see the second defendant at her house but she refused to transfer, not even two acres of the said land. The plaintiff said that he negotiated with the second defendant to

give him two acres of the said land and that she could keep the balance but at no time offered to buy. A

Under cross-examination the plaintiff maintained that Atok (PW1) did not sell the said land to the first defendant. He also said that the oral agreement between him and the first defendant was made in the presence of Atok (PW1) and Jelih. He denied that the first defendant paid RM100 to Atok for the said land. The plaintiff also said that after seeing Adot in 1978 he went twice to see the acting District Officer Kuching by the name of William Linang. The first time he went with Atok (PW1), and with the first defendant the second time as the acting district officer called the first defendant. The plaintiff admitted under cross-examination that the document of title was kept by the first defendant as he trusted him. B C

Questions were also put on the arrangement of the plaintiff with the first defendant regarding the said land but the plaintiff maintained that there was a discussion in the house of the first defendant in the presence of Atok (PW1), Jelih, the first defendant and the plaintiff with regard to the choice of a nominee for the plaintiff in the purchase of the said land. The plaintiff also said that the first defendant told him that he (the first defendant) would not cheat him as he had plenty of land and that the said land was subject to flood and he (the first defendant) did not want it. D

The plaintiff called Atok anak Mangnian @ Atok anak Manyit (PW1) as his witness. Atok testified that he is a Tuai Rumah. He further stated that on 19 November 1961 the plaintiff enquired from him if he had any land for sale. At that time he had a piece of land for sale at Kampong Sungai Tapang which is the said land and now located next to the airport. He agreed to sell the said land to the plaintiff for RM200 with him paying for the stamp duty, transfer fee and land rent. This witness said that he did not pay for the land rent of RM6pa since 1952 when the said land was alienated to him. The total expenses therefore came up to RM99. Atok also testified that the plaintiff made use of the name of the first defendant so as to prevent him (Atok) from selling the said land to another person and further, at that time the plaintiff was underage and did not have a native status. Atok said that he had personal knowledge of the arrangement made at the Lands and Surveys Office, Kuching between the plaintiff and the first defendant as he was present together with Jelih. This witness further said that there was also a prior discussion between him, the plaintiff and Jelih over the same matter. He said that the RM200 was paid directly by the plaintiff to him. He denied that the first defendant paid RM100 to him for the said land. Atok also admitted that both the plaintiff and the first defendant are his relatives. E F G H

Under cross-examination Atok said that he had no quarrel with the first defendant. He was also sure that the plaintiff came to see him on 19 November 1961. A series of questions were put to this witness alleging basically that he sold the said land to the first defendant but he denied. He also said that though he was poor he did not offer the said land to the first defendant. His intention was to sell the said land to the plaintiff and as he knew of the arrangement between the plaintiff and the first defendant he signed the memorandum of transfer (exh P1). In reply to a question this witness said that he knew of the dispute between the plaintiff and the first I

A defendant about ten years ago. When asked about the persons present during the first discussion, this witness replied that only three of them were present, namely, the plaintiff, Jelih and himself. He said that it was first intended that Jelih was to be the nominee of the plaintiff.

But on re-examination this witness said that at the Lands and Surveys Office the first defendant said that he was to be the nominee of the plaintiff.
B The first defendant and Jelih were invited by the plaintiff to come along at that time.

(ii) The defendants' version

The first defendant who appeared to be young for his age of 82 years old
C testified that in 1961 he was staying in Kampong Sungai Tapang. He considered himself in 1961 as a rich man as he owned a shop and a pepper garden. He also had about 60 acres of land. As such he said that he could therefore buy the said land for RM100 from Atok (PW1). According to the first defendant it was Atok (PW1) who came to his shop to sell the said land
D and that the first defendant would have to bear the stamp duty. It was only Atok (PW1) and himself who went to the Lands & Surveys to transfer the said land and that he kept the issue document of title for the said land until he gave it to his lawyers. He had no discussion with the plaintiff and Jelih regarding the transfer of the said land. He also denied that the plaintiff came to see him to appoint him as the nominee for the plaintiff in respect
E of the said land. In short, the first defendant said that the plaintiff has nothing to do with the said land.

The first defendant also denied that the plaintiff was staying in Kampong Sungai Tapang in 1961. He said that the plaintiff was staying with his mother in Kampong Stigang and that he was never the guardian of the plaintiff. However, the first defendant admitted that the grandmother of the
F plaintiff was the sister of his mother and as such he was kind to him. He said that he gave a piece of land which was not surveyed to the plaintiff in 1961. For that reason he helped the plaintiff to obtain a native status.

The first defendant further testified that in 1978 the plaintiff came to see him regarding the said land. He said that the plaintiff was very specific and
G he asked him to sell some of the said land for the plaintiff to build a house.

Under cross-examination the first defendant corrected himself regarding the keeping of the issue document of title for the said land. He said that he kept the document until he gave it to the second defendant in 1970. He was also uncertain when he collected the document from the Lands & Surveys Office. At one point he said a few days but later on he said a few weeks after
H the transfer at the Lands and Surveys Office.

Then the first defendant went into a stage of first giving definite answers but only to retract or correct himself when evidence to the contrary was put to him. For instance he said he remembered clearly that he gave the second defendant only one piece of land which is the said land. But when he was referred to other pieces of land he corrected himself. He also subsequently
I corrected himself with regard to the ownership of the Merdiang's land when it was first purchased. Initially the first defendant said that the Merdiang's land was never in his name. Even at one point he was positive that he gave the land at Tambadak to the second defendant on 16 March

1970 but when pressed on further he admitted it was the land at Merdiang. Then he further said with certainty that the pieces of land he had given to the second defendant were given in time sequence of their acquisition by him.

The first defendant also went into the exercise of not being able to remember certain matters when put to him. For instance he said that he paid RM100, the stamp duty and other expenses for the said land. But when he was referred to his earlier testimony during the examination-in-chief where he said that he paid RM100 and the stamp fee, he had no hesitation saying that he could not remember saying such thing. Again he was positive that it was only he and the plaintiff who went to apply for the native status of the plaintiff. He was sure Atok (PW1) was not with them. But when it was put to him that Atok (PW1) was with them he replied that he could not remember. He, however, admitted having thumb-printed on that day a document in connection with the application of the plaintiff for a native status. It was also put to him that exhs P3 and P1 were thumb-printed on the same day as both had the same date but he replied that he could not remember which one was thumb-printed first. When it was put to him that the plaintiff was staying in the same kampong as him in 1961 the first defendant also replied that he could not remember since it had been such a long time. But he mentioned giving a piece of land to the plaintiff. No document was produced to substantiate his claim though he said that there was a letter and it was with the plaintiff. Incidentally the plaintiff was never asked on this issue by the defence even when he was recalled. On the evidence of Atok (PW1) the first defendant said that he had no quarrel with Atok (PW1) but he disagreed with the version of Atok (PW1) in respect of the said land.

On re-examination the first defendant again managed to say that the plaintiff was not staying in the same kampong as him in 1961. He also said with certainty that exhs P1 and P3 were not done on the same day and that only he and the plaintiff went to make exh P3.

When questioned by the court the first defendant said that exh P3 was thumb-printed in front of the district officer at the district officer's office. He was sure of that.

As for the second defendant, she admitted having three pieces of land, namely, the said land which was given to her by the first defendant, the Merdiang's land also given to her by the first defendant and the Tambadak's land bought by her with borrowed money from the first defendant. She also said that the said land was bought by the first defendant from Atok (PW1). She denied receiving any letter from the plaintiff. The second defendant further testified that in 1979 the plaintiff asked her to sell two acres of the said land to him to enable him to build a house but she refused. The second defendant also said that she knew the plaintiff and his family and in 1961 they were staying in Kampong Sungai Tapang.

Under cross-examination the second defendant admitted that the memoranda of transfer dated 16 September 1970 and 16 March 1970 respectively were in her name. Accordingly they were marked as exhs P6 and P7 respectively. She did not agree to the suggestion put to her that the

visit of the plaintiff to her house was to request her to transfer the said land to him.

(iii) The finding of the court

From the evidence adduced I have to consider several matters before deciding which is the credible version. There is no doubt that there are discrepancies in the evidence given by both sides but some do not materially affect the issue before me. However, there are several important matters which require further consideration.

(i) The first defendant denied that the plaintiff stayed in the same kampong as him in 1961. But Atok (PW1) who was the Assistant Tuai Rumah of Kampong Sungai Tapang at that time and the plaintiff stated otherwise. Even the second defendant said that the plaintiff was staying in Kampong Sungai Tapang. On this point I have no reason to disbelieve Atok (PW1) and the plaintiff.

(ii) Exhibits P3 and P1 have the same date, namely, 27 November 1961. But the first defendant said that it was only he and the plaintiff who came to apply for the native status of the plaintiff. If that was the case then there was no explanation why the documents have the same date and there was also no challenge as to the signature of Atok (PW1) on exh P3. On exh P1 Atok (PW1) also signed on it. Indeed the first defendant said that exh P3 was thumb-printed before the district officer. On perusal of both the documents I find that they were duly attested by government or public officials. In my view therefore this is an appropriate case to invoke s 114(e) of the Evidence Act 1950. Accordingly on a balance of probabilities it is my conclusion that on the day in question, 27 November 1961, Atok (PW1) must have been with the plaintiff and the first defendant. I cannot therefore accept the evidence of the first defendant that when exh P1 was executed only him and Atok were present. I find as well that when exh P3 was signed Atok was also present. Further, I find exhs P1 and P3 to be of good corroborative evidence for the plaintiff's version.

(iii) Nothing was suggested by the defence as to any motive of Atok (PW1) the former owner of the said land, in testifying for the plaintiff. Atok's (PW1) evidence also corroborated the plaintiff's version of the event. No doubt there was no question put to this witness from either side pertaining to the signing of exh P3. But having scrutinized the material and relevant parts of Atok's (PW1) testimony including his demeanour in the witness box, I am satisfied on a balance of probabilities that he is a witness of truth.

(iv) The first defendant testified that he paid Atok (PW1) only RM100. The other expenses were borne by him. But from the statement of defence the first defendant appeared to have paid only RM18 in addition. There was no mention of the land rent which according to Atok (PW1) were not paid since 1952, the year of alienation. But Atok (PW1) and the plaintiff were unanimous in that RM200 was

paid to Atok (PW1) and he paid for the expenses including the land rent from that sum. I also find that the first defendant was inconsistent on this issue of how much was paid. Thus, on a balance of probabilities I have no reason to believe what was said by the first defendant on this issue.

(v) The first defendant said that in 1978 the plaintiff came to see him with the view to buy a portion of the said land to build a house. My comment on this portion of the evidence of the first defendant is that he was painting a picture that the plaintiff was very specific on his choice out of his 60 acres of land. Further, such statement appears to say that the plaintiff after failing to persuade the first defendant formulated a scheme to get the said land. But after balancing the testimony of the first defendant with the evidence of this case as a whole I find it very difficult to believe him. It requires preconceived planning and illicit co-operation of Atok (PW1). Anyway, nothing was suggested by the defence to that effect. I do not find therefore any probability on this aspect of the evidence of the first defendant.

(vi) Overall I find the evidence of the first defendant unsatisfactory in terms of credibility. I am aware of his advanced age. However, on some material issues he appeared to be very certain to say what were in his favour but only to retract what he had said when challenged with evidence to the contrary or to retreat to the obvious, namely, unable to recall. I am very much aware that the plaintiff and Atok (PW1) did have discrepancies in their testimonies. However, when balanced with the evidence as a whole and the probability of this case I am inclined to believe them having heard and seen them in the witness box rather than the defendants.

(vii) From the questions posed and the replies given during the cross-examination of Atok (PW1) it also appeared that the defence did not strongly challenge the presence of Jelih anak Mawah (deceased) during the transfer of the said land. Thus, if that was the case, then what the first defendant said regarding the people present during the transfer of the said land, being only he and Atok (PW1), has no truth.

(viii) The evidence of the second defendant was not much of a help to support the version of the defence. At most it was only the impression of the second defendant that the plaintiff came to see her in 1979 to buy two acres of the said land. The plaintiff denied making any offer to purchase any portion of the said land.

(ix) There was also no challenge from the defence regarding the representation made by the plaintiff to the acting district officer, Mr William Linang after he saw the second defendant. The first defendant was called by the acting district officer. Was such an action also part of a whole scheme of the plaintiff to get the said land? I very much doubt it. Unfortunately not much was said by learned counsel for the parties on the issue.

Based on the above considerations it is my finding on a balance of probabilities that the version of the plaintiff is the credible and probable version and I so hold. Specifically, I find that there was a sale of the said

land from Atok (PW1) to the plaintiff with the plaintiff paying for the purchase price, that there was an arrangement that the first defendant was to be the nominee of the plaintiff until he attained the age of majority and acquired a native status, that the said land was given to the second defendant by the first defendant for natural love and affection, that the plaintiff had asked the defendants for the transfer of the said land but was refused and that the plaintiff had since acquired a native status and was of full age when he commenced this action.

(b) *Whether the said land was held on trust for the plaintiff and the requirement in writing or manifestation by some writing of such trust*

In view of my finding aforesaid it follows that the first defendant was holding the said land on trust for the plaintiff. This is more so as there was evidence adduced which I found credible and acceptable that the plaintiff paid for the purchase price of the said land.

Volume 48 *Halsbury's Laws of England* (4th Ed) para 524 states, inter alia:

> Resulting trusts are of two kinds. A presumed resulting trust arises from the application of a rebuttable presumption of intention that property purchased wholly or partly by X but vested in Y's name should be held by Y on trust for X to the extent of X's share in the purchase. An automatic resulting trust arises where X transfers property to Y on trusts which for some reason fail to dispose wholly of X's beneficial ownership so that Y automatically and irrebuttably holds the property on trust for X to the extent of X's undisposed of beneficial interest.

And further down in the same edition at para 605, it states:

> Where a person purchases property in the name of another or in the name of himself and another jointly, or gratuitously transfers property to another or himself and another jointly, then, as a rule, unless there is some further indication of an intention at the time to benefit the other person or some presumption of such an intention, the property is deemed in equity to be held on a resulting trust for the purchaser or transferror.

(See also *Dyer v Dyer*;[2] *Pettitt v Pettitt.*[3])

In the instant case it is not the case of the defence that there was such an intention of the plaintiff. The defence is one of complete denial of the existence of any kind of trust. But in my view this case fits 'in with the classical case of a purchase being taken in the name of a stranger, which would constitute the nominal purchaser a resulting trustee for the one who provided the purchase money' per Chang Min Tat FJ in *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd*[4] at p 194F (right column). (See also *Yew Phaik Hoon v Quah Ooi Keat & Anor.*[5])

One matter which was brought up in submission by learned counsel for the defendants is that the pleadings of the plaintiff do not allege any resulting trust. This is a procedural objection which should have been brought up at the earliest opportunity available. Further, besides making the bare assertion learned counsel did not elaborate any further. After having given further consideration to the pleadings I am of the view that the contents therein support the allegation of trust including the issue of

resulting trust and moreover I do not think the defendants were taken by surprise. (See *Wong See Leng v C Saraswathy Ammal*;[6] *Esso Petroleum Co Ltd v Southport Corporation.*[7]) After all the defence of the defendants is one of total denial of an existence of any kind of trust on the said land.

The next issue submitted by the learned counsel for the defendants was that even if there was a trust it was invalid as it was not reduced into writing or evidenced in writing. This aspect of the submission was not anticipated by the draftsman of the statement of defence. Based on the general principle that parties are bound by their pleadings I am not obliged to consider this issue. But since so much emphasis has been put on it perhaps it may be reasonable if I make a passing observation on it.

Learned counsel for the defendants submitted that this court is bound by the decision of the then Federal Court in *Lee Phek Choo v Ang Guan Yau & Anor.*[8] In that case the facts may be briefly stated as follows: one Teo Kim Tee (f) owned some landed properties. Before her death she transferred her properties to her daughter-in-law, the appellant. The transfer documents were duly registered. The respondent alleged that the deceased had intended and declared that the properties were to be held on trust to be divided between all the grandchildren of the deceased after her death. There was no writing to indicate any declaration of trust by the deceased but was based solely on oral evidence. It was held that as the Statute of Frauds applied in Sarawak and as there was no writing to manifest the declaration of trust there was no trust created affecting the landed properties.

On a cursory reading of *Lee Phek Choo*'s case[8] it appears that the present case should be decided on the same footing. However, on closer scrutiny of this instant case it is distinguishable from that case. It was a simple transfer of landed properties from mother-in-law to daughter-in-law in that case. In the present case, however, the said land was purchased and transferred. Thus, *Lee Phek Choo*'s case[8] hinged on the allegation of a declaration of trust or an express trust whereas the present case is on the basis of a resulting trust. Since the former dealt only with a declaration of trust on land, the facts of the present case as found do not warrant that this court follow that decision. Accordingly, in my judgment there was no requirement in this case for the arrangement made between the plaintiff and the first defendant to be in writing or manifested by some writing as it is one of resulting trust. (See 48 *Halsbury's Laws of England* (4th Ed) para 524; *Snell's Principles of Equity* (28th Ed) at p 107 and *DHN Food Distributors Ltd v Tower Hamlets London Borough Council.*[9])

In fact in the subsequent case of *Tay Guan Ho v Chin Huat Hin Co*,[10] this is what his Lordship Lee Hun Hoe CJ (Borneo) said of *Lee Phek Choo*'s case[8] at p 708:

> The decision of *Lee Phek Choo*'s case was to a large extent influenced by the case of *Chin Yuk Kon v Chop Koong Onn* [1949] SCR 19 where in an alleged contract of guarantee the position was accepted as governed by the Statute of Frauds. ... *Lee Phek Choo*'s case is limited in its applicability to Sarawak and whether it has been decided per incuriam or it applies to Sabah or not would have to be left open to another occasion when we have the opportunity of hearing fuller arguments from both sides.

Learned counsel for the parties also indulged in great length on the applicability of the Statute of Frauds in Sarawak and what is left of it due to subsequent legislation such as the English Law of Property Act 1925.

Learned counsel for the plaintiff submitted that the said Statute of Frauds applies in Sarawak by virtue of s 3(1)(c) of the Civil Law Act 1956 ('the 1956 Act') but as administered or in force in England on 12 December 1949 subject to s 3(3)(ii) of the same Act. Learned counsel also said that as of 12 December 1949 only s 4 as amended of the said Statute was in force in England as the other relevant 23 sections had been repealed. He then proceeded to set out the repealed sections and the repealing legislation as follows:

	Statute of Frauds		Repealing legislation
(a)	Sections 1, 2 & 3	repealed by	Law of Property Act 1925 ss 207, 209 & Seventh Schedule
(b)	Sections 5, 6, 12, 18 to 22	repealed by	Wills Act 1837 s 2
(c)	Sections 7, 8, 9 & 24	repealed by	Law of Property Act 1925 s 53
(d)	Sections 10, 11 & 23	repealed by	Administration of Estates Act 1925
(e)	Sections 13 & 14	repealed by	Civil Procedure Acts Repeal Act 1879
(f)	Sections 15 & 16	repealed by	Sale of Goods Act 1893
(g)	Section 17	repealed by	Statute Law Revision (SLR) and Civil Procedure Act 1881

Learned counsel for the plaintiff further said that only ss 7 and 8 of the Statute of Frauds are relevant to the present case. But he contended that s 53 of the English Law of Property Act 1925 had repealed and replaced them and the said Act is not applicable in Sarawak as the state has its own Land Code. (See *Tay Guan Ho v Chin Huat Hin Co.*[10]) Learned counsel further submitted that even s 4 has been amended, firstly, by the English Law of Property Act 1925, resulting in the deletion of the limb affecting disposition of land and, secondly, by the Law Reform (Enforcement of Contracts) Act 1954 of the United Kingdom which continues to apply in Sarawak by virtue of the Second Schedule of the 1956 Act. Learned counsel went on to say that indeed with effect from 4 June 1954 the requirement for the existence of some memorandum or note thereof being in writing and signed by the party to be charged therewith or some other person lawfully authorized by him relates only to contracts of guarantee. (See *Chong Ngian Shoon v Chai Choon Moi*[11] and *Agnes Wong Yen Hee v Tang Cheong Tie.*[12])

Having considered the submissions of learned counsel for the plaintiff on the issue and having stated my earlier reason for distinguishing this case from *Lee Phek Choo*'s case,[8] I do not think it is necessary for me to amplify

another reason as urged by learned counsel for the plaintiff. Suffice it to say that the review of the provisions of the Statute of Frauds in relation to other relevant legislation is correct and merits further consideration in future on cases of a similar nature to *Lee Phek Choo*'s case.[8]

(c) *The arrangement and illegality*

It is also the contention of the defendants that the arrangement made between the first defendant and the plaintiff and as described by the plaintiff was illegal as it contravened the provisions of the Land Code (Sarawak Cap 81) (hereinafter called 'the Code'). The relevant provisions referred to were s 8, in particular, paras (a) and (b), and s 9(1)(b) and (2) of the Code.

The relevant provisions of s 8 reads:

> Save as provided in section 9
>
> (a) a person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, Native Customary Land or Interior Area Land;
>
> (b) any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege, shall be deemed to have been entered into for an illegal consideration; and, in particular but without prejudice to para (d), any consideration which shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished; ...

The relevant provisions of s 9 reads:

> (1) Section 8 shall not be deemed to prohibit the acquisition by any non-native of any land to which the provisions of that section apply, or of any rights or interest in or over such land—
>
> ...
>
> (b) whenever such non-native has become identified with and subject to any native system of personal law;
>
> (2) For the purposes of this section, a person shall be deemed to have become identified with and subject to any native system of personal law upon any event upon which any written law provides he shall become so identified and subject or if he is accepted by any native community as being identified with and subject to the system of personal law of such community.

Learned counsel for the defendants admitted that the issue of illegality was not pleaded but submitted that as the arrangement was, on its face, illegal, the defendants could take the objection or the court could do so. Indeed that is settled law as indicated in *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd*[13] where his Lordship Peh Swee Chin SCJ said at p 288F:

> Courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is ex facie illegal.
>
> When the contract is not ex facie illegal, then on the question of pleadings, there is only one situation where illegality need not be pleaded when the court

A can still take judicial notice of illegality and refuse to enforce it. The situation is when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality, eg the illegal purpose of the contract, or its illegal consideration, with the presence of all relevant circumstances, ...

In the present case it is not so much of the arrangement being ex facie illegal; rather, it is what has been adduced in evidence. It is common ground that the plaintiff is of Chinese and Iban parentage. It is also not in dispute that it was only on 20 June 1979 that he was identified as a native of Sarawak although as early as 27 November 1961 the plaintiff had executed exh P3 which was also duly signed by the first defendant and Atok (PW1). Thus, having heard the evidence adduced I am satisfied that the issue of illegality merits consideration by this court although it has not been specifically pleaded in the defence.

In support of his argument learned counsel for the defendants cited *Manang Lim Native Sdn Bhd v Manang Selaman*;[14] *Idris bin Haji Mohamed Amin v Ng Ah Siew*[15] and *Hussanjan v Haji Nik Yahya bin Nik Daud & Ors.*[16] Learned counsel also said that the case of *Foo Say Lee v Ooi Heng Wai*[17] is distinguishable but without further elaboration.

In reply to such a contention learned counsel for the plaintiff relied on *Foo Say Lee*'s case.[17] He also said that s 8 of the Code is not an absolute prohibition and that s 9(1)(b) must necessarily refer to a non-native attaining native status after an acquisition of native land. Learned counsel also urged this court to consider that:

(i) the trust arrangement between the plaintiff and the first defendant was not to evade, frustrate or defeat the provisions of the Code;
(ii) it was also not for immoral or illegal purpose but to enable the plaintiff to seize a bargain that came along;
(iii) there was no fraudulent intention to defeat the Code; and
(iv) the fact that the parties hastened to affirm exh P3 and that the plaintiff took steps and secured a native status vindicated him.

As stated earlier on in this judgment it is no longer in dispute that the plaintiff has already satisfied or complied with s 9(1)(b) of the Code as of 20 June 1979 by virtue of exh P5. But learned counsel for the defendants submitted that the crucial period was 1961 when the arrangement between the parties took place. I agree that the material period is 1961 and at that point in time the plaintiff has not satisfied s 9(1)(b) of the Code. It is not in dispute, however, that s 8 of the Code is not one of absolute prohibition but a qualified one. (See *Manang Lim Native Sdn Bhd*'s case.[14])

Is it not within the ambit of the law if a person makes an arrangement with another subject to compliance with the relevant provisions of the law? Could such an arrangement be enforced as and when the relevant laws have been complied with? In order to consider these foregoing questions it may be appropriate to note what was said by his Lordship Azmi CJ (Malaya) in *Foo Say Lee*'s case[17] at p 49D–G (left column):

> With respect, in my view, this question could be solved this way. If you read s 12(i) carefully, it will be apparent that only attempts to deal in reservation land *contrary to the provisions of the Enactment* would be null and void so that though the agreement between the two parties could be regarded as an attempt to deal

in reservation land it is not in my view, an attempt to deal in the land contrary to the provisions of the Enactment.

My reasons are simply this. Section 13A(i) of the Enactment gives the power to His Highness the Ruler in Council in his discretion to approve a transfer of a right or interest of any Malay in reservation land to any person not being a Malay. Since the Enactment itself has provided a method of effecting a transfer of reservation land from a Malay to a non-Malay, I am unable to come to the conclusion that any agreement to transfer such land by a method so provided by the Enactment itself, can be said to be contrary to the provisions of the Enactment and therefore null and void under s 12; nor could it be said that the agreement is an attempt to evade the provisions of the Enactment. (Emphasis added.)

Although his Lordship was dealing with a different statute I think the principle derived thereof can be applied to the present case as the objective of the statute in that case and the Code in this case is similar. Thus where an arrangement or an attempt to deal in native land is made subject to compliance with the provisions of the Code it is not null and void if such an arrangement or attempt to deal is not contrary to the provisions of the Code. Based on my earlier finding in this case it is apparent that the arrangement between the plaintiff and the first defendant was subject to the plaintiff attaining the age of majority and acquiring a native status. Both conditions were satisfied by the plaintiff when he instituted this action. In fact the plaintiff stated in evidence that the first time he asked the first defendant to transfer the said land to him was in 1963 when he received exh P3 which he assumed to be a native certificate. Surely such action can be considered to show that there has been no intention to evade the provisions of the Code.

This case is distinguishable from *Manang Lim Native Sdn Bhd*'s case.[14] In that case the arrangement was not subject to compliance with the provisions of the Code. From my reading of the contentions advanced by the learned counsel for appellant in that case it is obvious that it was thought that the appellant, a corporate body, could be considered a native by reason of the majority shareholders
being natives. The arrangement of the parties in that case was therefore an attempt to deal in a native land contrary to the provisions of the Code. Similarly in *Idris bin Haji Mohamed Amin*'s case[15] the arrangement between the parties in that case was held to amount to an evasion of the Malay Reservations Enactment 1913. There was also no proviso for compliance with the Enactment.

Accordingly, in my judgment the arrangement made in 1961 between the plaintiff and the first defendant was not illegal, null or void. As the conditions stipulated under the arrangement have been satisfied the plaintiff is also entitled, in my view, to enforce the arrangement.

In passing it is to be noted that learned counsel for the defendants abandoned the plea on limitation and I shall not deal with it any further.

(d) *The present position of the said land*

It is common ground that the said land is now registered under the name of the second defendant. It is also not in dispute as shown in exh P6 that it was given by the first defendant to the second defendant for 'natural love

A and affection' being on father-daughter relationship. In other words the second defendant was only a volunteer.

Section 134(1) of the Code reads:

> Any issue document of title or entry or alteration in the Register procured or made by fraud shall be void as against any person defrauded, or who may be
B defrauded, thereby, and no person who is a party or privy to the fraud, or who claims solely as a volunteer under such person, shall take any benefit therefrom.

In view of my finding that the said land was held on trust by the first defendant it follows in my judgment that his action of transferring it to the second defendant constituted a serious breach of trust besides being
C fraudulent and dishonest. He knew of the existing right of the plaintiff yet by a deliberate and dishonest act he caused such right to be obliterated. Such an act fits into the principle of law expounded by his Lordship Syed Othman FJ in *Loi Hieng Chiong v Kon Tek Shin*[18] at p 36B (left column) when he said this:

D
> ... fraud must be actual. There must be dishonesty of some sort. Fraud may be established if the designed object of a transfer is to cheat a man of a known existing right; or where by a deliberate and dishonest act a person loses an existing right.

Accordingly as the second defendant was only a volunteer she did not benefit from such a void transfer by reason of s 134(1) of the Code.

E Further, I am also of the view that since the first defendant was holding the said land as a bare trustee he was in no position to convey any beneficial interest therein to anyone. The maximum: 'Nemo dat quod non habet' (no one gives what he does not possess) is aptly relevant.

F (e) *Conclusion and orders*

In the instant case the issue of tracing was not raised or disputed by the defence. Accordingly, from my findings aforesaid the only conclusion that I should make is that the plaintiff has succeeded in establishing his case. In the circumstances I enter judgment for the plaintiff as follows:

G (a) a declaration that the first defendant was a trustee of the said land for the plaintiff and that the first defendant has fraudulently and dishonestly committed a breach of trust in transferring the said land to the second defendant by way of gift;

(b) a declaration that the plaintiff is still beneficially entitled to the whole
H of the said land;

(c) a declaration that the transfer by way of gift from the first defendant to the second defendant and registered at the Kuching Land Registry Office on 16 September 1970 is null and void;

(d) that it is hereby ordered that:

I (i) the defendants do deliver the issue document of title to the said land to the plaintiff or his advocate within seven (7) days from the date thereof;

(ii) the first defendant is to execute a registrable memorandum of transfer to transfer the said land to the plaintiff within seven (7)

days from the date thereof, failing which the senior assistant registrar, High Court III, will execute the memorandum of transfer; and

(iii) in the event of any appeal items (i) and (ii) aforesaid are stayed pending the disposal of such appeal;

(e) that subject to production of valid receipts or verification from the relevant authority all payments of land rents and assessment in respect of the said land by the defendants are to be reimbursed to them by the plaintiff;

(f) costs to the plaintiff to be taxed.

Plaintiff's claim allowed.

Reported by Yap Foo Ken